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In the Supreme Court of the United States

1621

DONALD BARGER, *Petitioner*

vs.

STATE OF WASHINGTON, *Respondent*

Petition for Writ of Certiorari to the Supreme Court of the State of Washington

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J. P. TONKOFF,
Counsel for
Petitioner, Barger

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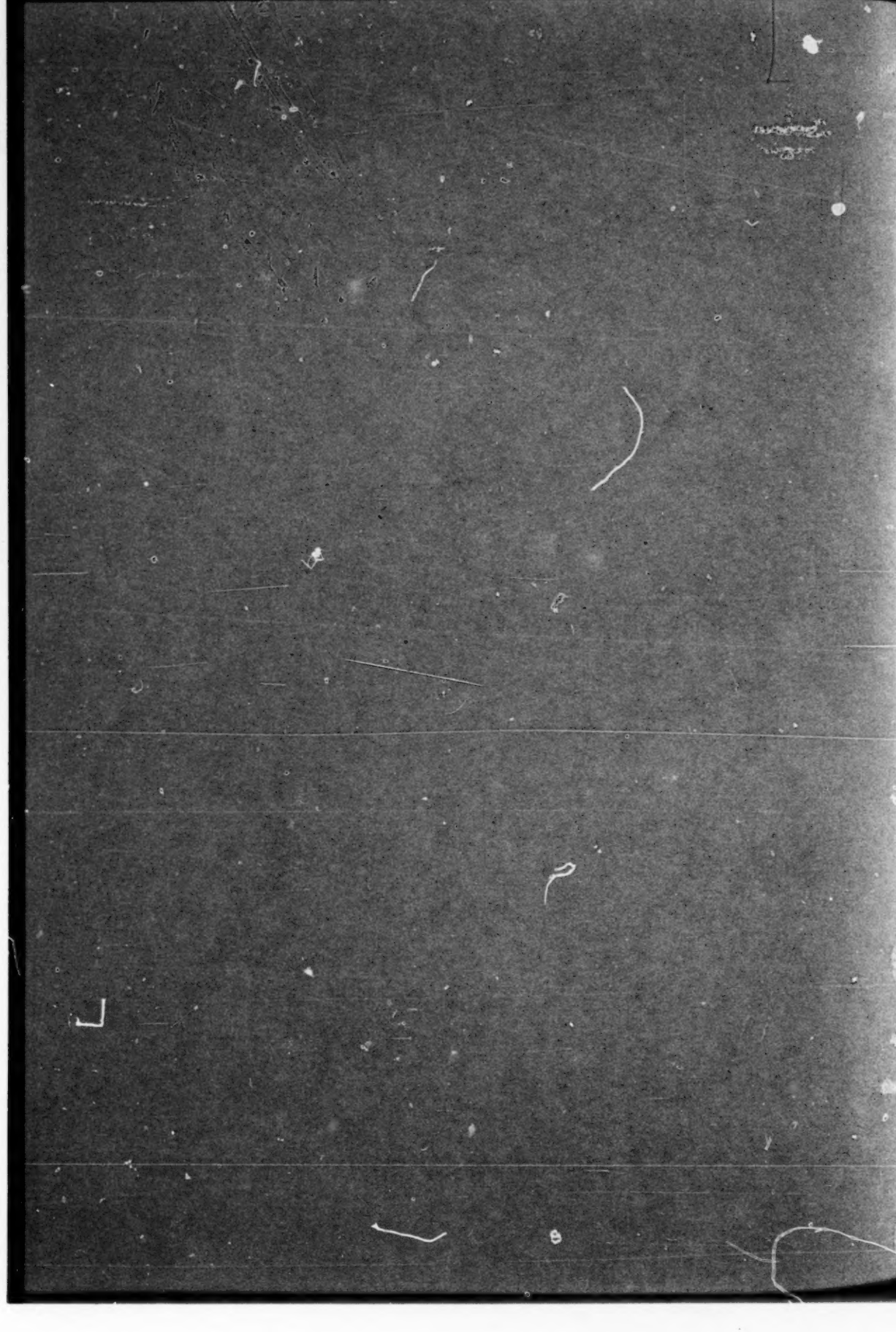

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In the Supreme Court of the United States

DONALD BARGER, *Petitioner*

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Petition for Writ of Certiorari to the Supreme Court of the State of Washington

DONALD BARGER prays for the issuance of a Writ of Certiorari to review the judgments of the Superior Court, Appellate Court and the Supreme Court of the State of Washington denying the dismissal of a criminal information now pending against this petitioner, Donald Barger.

OPINIONS BELOW

Upon this petitioner's presentation for a dismissal of an Information charging the petitioner with the crimes to-wit:

1. Accessory to the commission of a felony;
2. Contributing to the delinquency of a minor (by supplying liquor to said minor), the Superior Court of

Franklin County Washington entered an "Order Denying Motion to Dismiss Information" which Order reads: (Tr. 0005)

"IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF FRANKLIN

STATE OF WASHINGTON, *Plaintiff,* vs. DONALD BARGER, *Defendant.*	NO. 2729 ORDER DENYING MOTION TO DISMISS INFORMATION

THIS MATTER having come on for hearing December 18, 1970, upon defendant's motion to dismiss the information on file herein, defendant not being personally present but represented by J. P. Tonkoff of Tonkoff, Dauber and Shaw, and the State of Washington being represented by C. J. Rabideau, Franklin County Prosecuting Attorney, and the court having read the motion, reviewed the authorities cited, and listened to the arguments of counsel for both parties and having found that the elements of the crime charged in Benton County, to-wit: Sodomy, are unrelated to the two crimes charged in Franklin County, to-wit: (1) Accessory to Commission of a Felony; and (2) Contributing to Delinquency of a Minor (by supplying liquor to said minor) even though the alleged victim of the Benton County crime is the same person as the minor alleged in counts I and II of the Franklin County Information, and the three offenses were unrelated as to time, and the Court's Memorandum Opinion is made a part hereof, NOW THEREFORE,

IT IS HEREBY ORDERED that defendant's motion to dismiss the information on file herein is denied.

DONE BY THE COURT this 8 day of December, 1970.

/s/
JOHN THOMAS DAY, Judge

Presented by:
/s/ C. J. Rabideau
C. J. Rabideau
Prosecuting Attorney"

From which Order a Writ of Certiorari was sought in the Court of Appeals of the State of Washington, Division III. Pursuant to an argument in said court, without a written opinion, an order was issued dated January 22, 1971, to-wit: (Tr. 0006)

"IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, *Respondent*,	No. 341-III Division Three
v.	ORDER DENYING
DONALD BARGER, *Petitioner*.	PETITION FOR WRIT OF CERTIORARI

This matter having come before the court on an order to show cause why petitioner's petition for writ of certiorari should not be issued, counsel for both parties being present, the court having considered oral arguments of counsel, memorandum briefs of both parties, the trial court's order and memorandum opinion, and being fully advised in the premises; Now, therefore, it is

ORDERED that petitioner's petition for writ of certiorari be and the same is hereby denied.

DATED at Spokane, Washington, this 22 day of January, 1971.

By the Court:

/s/
Ray E. Munson
Chief Judge"

From which Order, as a last resort, a Petition for Writ of Certiorari was sought in the Supreme Court of the State of Washington, to-wit: (Tr. 0001-0004)

"IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, *Respondent,*	NO. 41853
vs.	PETITION FOR WRIT OF CERTIORARI
DONALD BARGER, *Petitioner.*	

PETITIONER SHOWS UNTO THE COURT AS FOLLOWS:

1.

That your petitioner by criminal complaint filed in Benton County in August of 1970, was charged with the crime of sodomy. That your petitioner went to trial on November 4, 1970 in Benton County, Washington and a verdict was returned by the jury of Not Guilty and judgment of dismissal was entered in said matter.

2.

A warrant for the arrest of the petitioner was issued on the 4th day of September, 1970 in Franklin County and on said date an Information was filed charging your petitioner with the crime of Accessory to Commit a Felony by assisting a minor to avoid or escape trial, conviction and punishment in one count and the second count of Contributing to the Delinquency of a minor by supplying liquor to said minor.

3.

That the minor referred to in said Information is the complaining witness in the sodomy case filed in Benton County. That said minor referred to in the Franklin County case is the same minor that testified in the Benton County case and is the same minor referred to in Count I and II in the Franklin County proceeding.

4.

That heretofore your petitioner filed a Motion to Dismiss the Information in Franklin County on the ground and for the reason that he would be subjected to double jeopardy in violation of his constitutional rights for the reason and on the grounds

that in the trial held in Benton County the court received evidence relating to the association and course of conduct between your petitioner and complaining witness which extended over a period from May 30th until the end of August, 1970, which evidence included the acts which constituted the charge in the criminal complaint brought against your petitioner in Franklin County.

5.

That your petitioner's motion to dismiss was heard by the Superior Court of Franklin County and on the 8th day of January, 1971, the court entered an Order denying your petitioner's Motion to Dismiss the Information filed in said court which Order is hereby attached and marked Ex. "A".

That your petitioner requested an issuance of a Writ of Certiorari out of the Court of Appeals for the State of Washington, Division III, and the same matter was given Cause No. 341-III, and by Order dated January 22, 1971, the Court of Appeals denied the petition for Writ of Certiorari, a copy of which Order is attached hereto and marked Ex. "B".

That this petition is based on the proceeding which took place and which were reported by a Court Reporter and filed in this court in support of this Petition.

6.

That the trial court and the Court of Appeals committed grave and irreparable error and violation of your petitioner's constitutional rights by overruling your petitioner's Motion to Dismiss and Petition for Writ of Certiorari and your petitioner seeks to have the trial court's ruling reversed and petitioner's motion granted

WHEREFORE, your petitioner prays for an order reversing the trial court's ruling and dismissing the Information in Franklin County.

/s/ J. P. Tonkoff
J. P. TONKOFF
of TONKOFF, DAUBER & SHAW
Attorneys for Petitioner"

The Supreme Court of the state of Washington refused to take jurisdiction and entered the following Order: (Tr. 0038)

"February 22, 1971

Tonkoff, Dauber & Shaw
Attorneys at Law
Mr. J. P. Tonkoff
616 Miller Bldg.
Yakima, Washington 98901

Honorable Clarence J. Rabideau
Prosecuting Attorney
Franklin County Courthouse
Pasco, Washington 99301

Gentlemen:

Re: 41853 — State of Washington v. Donald Barger

Following the hearing on February 19, 1971, on the Petition for Writ of Certiorari in the above case, the following notation order was entered on page 222, Vol. 13, of the motion docket:

'Denied

/s/ Orris L. Hamilton,
Chief Justice'

Since the Supreme Court did not take jurisdiction, the cause will not be remitted.

Very truly yours,
William M. Lowry,
Clerk

WML:am

cc: Honorable Thomas Day, Judge
Franklin County Superior Court"

The final Order which can be entered in the jurisdiction of the state of Washington denying the Writ of Certiorari is dated February 22, 1971.

JURISDICTION

The jurisdiction of this court is invoked by virtue of 28 U.S.C. Section 1257:

> "§ 1257. **State courts; appeal; certiorari**
>
> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929."

QUESTIONS PRESENTED FOR REVIEW

1. Is the Petitioner who has been acquitted of a charge of sodomy in the Benton County Superior Court subject to further prosecution in Franklin County which adjoins Benton County upon a charge of a different felony and misdemeanor based upon the same evidence that was introduced in the prosecution of the sodomy charge in Benton County, Washington?

2. Is the Superior Court in Benton County and the

Superior Court in Franklin County separate political subdivisions or separate sovereign entities in the state of Washington?

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment Five of the United States Federal Constitution:

> "RIGHTS OF PERSONS CHARGED WITH CRIME — No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation."

AND Amendment Fourteen of the United States Federal Constitution:

> "CITIZENSHIP — EQUALITY OF RIGHTS — All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property; without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Eugene C. Priest, a minor was the complaining witness in an Information filed on the 13th day of August, 1970, charging Donald Barger, this petitioner, with the crime of sodomy in Benton County, Washington.

While the charge was pending, on the 4th day of September, 1970, Donald Barger, the petitioner, was charged in Franklin County, Washington, with the crime of harboring and concealing a minor who had committed a felony by unlawfully taking an automobile without the permission of the owner, with the intent that the minor avoid and escape arrest, trial, conviction or punishment.

The car taken belonged to Donald Barger, the petitioner.

In the second count, the petitioner was charged with contributing to the delinquency of a minor.

On the 4th day of November, 1970, Donald Barger, the petitioner, went to trial on the sodomy charge in Benton County and was acquitted by a jury and a judgment of dismissal entered in that cause.

No additional testimony will be introduced that was not introduced in the prosecution of the sodomy charge in support of the prosecution of the felony and the misdemeanor referred to in this petition.

The petitioner brought on a motion to dismiss the criminal charges brought in Franklin County, Washington upon the grounds that if tried he would be sub-

jected to double jeopardy in violation of his constitutional rights and further that he has an absolute legal defense of collateral estoppel for the reason that it is conceded or stipulated that the evidence to be introduced in the prosecution of the charges contained in the Franklin County, Washington case would be the same as the evidence introduced in the Benton County, Washington case. (Tr. 0008, 0009, 0012).

The trial court who presided over the trial in Benton County with respect to the sodomy charge was the same trial court who heard the petitioner's motion to dismiss the information filed in Franklin County charging the petitioner with a felony and a misdemeanor so the court was fully aware of the evidence that was to be presented in the second prosecution. The trial court in Franklin County announced that he considered that no additional evidence would be introduced in the prosecution of the Franklin County charge when he denied petitioner's motion to dismiss.

REASONS FOR GRANTING WRIT

The Supreme Court of the United States has squarely passed upon the questions presented for review in this petition for Writ of Certiorari in the case of *Waller v. Florida*, 25 L. Ed. 2d., 435; *State v. Hite*, 3 Wn. App. 9, 472 P.2d., 600 and *Ashe v. Swenson*, 25 L. Ed. 2d., 469.

The appellate courts in the state of Washington have declined to adopt the ruling of the United States Supreme Court set forth in the above cited cases. If the

petitioner is required to proceed to trial, his constitutional immunity would be violated and he would be denied the defense of collateral estoppel.

CONCLUSION

The questions presented by this petition are substantial and of public interest and importance. Denial of the petitioner's petition for Writ of Certiorari in this court would require the petitioner, Donald Barger, to be twice put in jeopardy contrary to his constitutional rights and stripped of his absolute legal defense of collateral estoppel.

Respectfully submitted,
J. P. TONKOFF,
Counsel for
Petitioner, Barger